Supreme Court, U.S.
FILED
APR 2 1999
OFFICE OF THE CLERK

No. 98-1425

In the Supreme Court of the United States

OCTOBER TERM, 1998

LUIS BONILLA, *et al.*,
PETITIONERS,

v.

VOLVO CAR CORPORATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

LAURENCE H. TRIBE
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

GAEL MAHONY
(Counsel of Record)
HILL & BARLOW, A PROFESSIONAL CORPORATION
One International Place
Boston, MA 02110
(617) 428-3000

(Additional counsel listed in signature block)

Blanchard Press, Inc., Boston, Mass — Law Printers (617) 426-6690

24 pp

QUESTION PRESENTED

Should this Court grant certiorari, vacate the judgment of the U.S. Court of Appeals for the First Circuit, and remand the case for further consideration in light of *Salinas* v. *United States*, 522 U.S. 52, 118 S.Ct. 469 (1997), notwithstanding the fact that the First Circuit's pre-*Salinas* precedent was not a factor in the judgment, that *Salinas* could not alter the outcome, and that Petitioners brought *Salinas* to the attention of the First Circuit in a petition for rehearing by that court?

LIST OF PARTIES

Respondent Volvo Car Corporation ("Volvo") does not object to Petitioners' statement of the Parties to the Proceeding (Petition, ii). In accordance with Rule 29.6 of this Court, Volvo hereby identifies its parent company as Ford Motor Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	12
I. The First Circuit's Decision Not To Reconsider Its Ruling In Light of *Salinas* Was Correct, Because *Salinas* Has No Bearing On This Case	12
A. *Salinas* Did Not Address Any Issue Relevant To The First Circuit's Decision	13
B. The First Circuit's Decision Foreclosed Any Argument That *Salinas* Could Be Relevant To The Result	14
II. GVR Is Inappropriate In Any Event Because Petitioners Squarely Presented *Salinas* To The First Circuit In Their Petition For Rehearing Below	17
III. There Is No Reasonable Probability That The First Circuit Would Alter Its Ruling If It Were Ordered To Reconsider Its Decision In Light Of *Salinas*	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

	Page
Aetna Cas. Sur. Co. v. *P & B Autobody*, 43 F.3d 1546 (1st Cir. 1994)	18, 19
Fitzgerald v. *Chrysler Corp.*, 116 F.3d 225 (7th Cir. 1997)	14
Goren v. *New Vision Int'l, Inc.*, 156 F.3d 721 (7th Cir. 1998)	14
Lawrence v. *Chater*, 516 U.S. 163 (1996)	16, 18
Salinas v. *United States*, 522 U.S. 52, 118 S.Ct. 469 (1997)	*passim*
Sedima S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985)	15
United States v. *Cassiere*, 4 F.3d 1006 (1st Cir. 1993)	5
United States v. *Winter*, 663 F.2d 1120 (1st Cir. 1981)	16

STATUTES

23 L.P.R.A. § 1023	7
15 U.S.C. § 1231	7
15 U.S.C. § 1231(a)	7
18 U.S.C. § 1341	3
18 U.S.C. § 1343	3
18 U.S.C. § 1961 *et seq*	1
18 U.S.C. § 1962(a)	3, 4
18 U.S.C. § 1962(c)	*passim*
18 U.S.C. § 1962(d)	*passim*
18 U.S.C. § 1964(c)	3, 10, 15

RULES

Fed. R. App. P. 28(j)	11
First Cir. Internal Operating Procedures X(C)	17
First Cir. Loc. R. 35.1	17
Sup. Ct. R. 29.6	ii

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Volvo Car Corporation ("Volvo") respectfully opposes the Petition for a Writ of Certiorari (the "Petition") filed by petitioners Luis Bonilla, *et al.* (the "Petitioners") to review the judgment of the United States Court of Appeals for the First Circuit in this case.

On July 28, 1998 the First Circuit reversed a judgment against Volvo under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"), entered by the United States District Court for the District of Puerto Rico. In the underlying action Petitioners, a class of purchasers in Puerto Rico of certain models of Volvo automobiles, alleged that Volvo and its codefendants had violated and conspired to violate RICO by engaging in predicate acts of mail and wire fraud. The First Circuit reversed the judgment against Volvo, because the court found that there was no evidence that Volvo had committed any RICO violation or had agreed to the commission of any RICO violation.

The Petition incorrectly states that the First Circuit reversed the judgment against Volvo on the basis of First Circuit precedent, now rejected by this Court, that a RICO conspiracy requires proof that the defendant agreed that it, and not another person or entity, would commit predicate acts. *See* Petition at 21-22.[1] The Petition's request for a GVR

[1] References to the Petition will be by "Petition," followed by the page numbers. References to the Appendix to the Petition will be by "Pet.App.," followed by the page numbers. References to the Joint Appendix in First Circuit Appeal No. 97-1135 will be by "Jt.App.," followed by the page numbers. References to Volvo's principal brief in Appeal No. 97-1135 will be by "Volvo Br.," followed by the page numbers. References to Volvo's reply brief in Appeal No. 97-1135 will be by "Volvo Reply Br.," followed by the page numbers. References to Petitioner's brief in Appeal No. 97-1135 will be by "Ptrs.Br.," followed by the page numbers. References to

order rests exclusively on *Salinas* v. *United States*, 522 U.S. 52, 118 S.Ct. 469 (1997), which rejected that First Circuit precedent and held that a defendant could be liable for RICO conspiracy even if the defendant agreed that someone *else* would commit RICO predicate acts. Petitioners seize on the timing of the *Salinas* decision, which coincided with the First Circuit argument in this case (and preceded the First Circuit decision by eight months), and assert that the First Circuit based its decision as to Volvo on the pre-*Salinas* precedent.

Nothing could be further from the truth. In its decision as to Volvo, the First Circuit never reached the question of what the alleged conspirators agreed concerning *who* would commit RICO predicate acts. That question did not arise, because the First Circuit decided that there was no evidence that Volvo entered into *any* RICO conspiracy. The premise of the Petition is thus wholly artificial: the pre-*Salinas* precedent of the First Circuit had nothing to do with the First Circuit's decision in this case. Asking the First Circuit to reconsider its judgment in light of *Salinas*, therefore, would be a pointless exercise.

STATEMENT OF THE CASE

Petitioners' Statement of the Case (Petition, 5-18) is replete with factual misstatements. This opposition corrects only the most egregious errors.

The Proceedings in the District Court

The Petition is the latest effort in a complex civil suit brought by Petitioners under RICO. In the district court, Petitioners "advanced various arguments at different times,"

Petitioners' Appendix in Appeal No. 97-1135 will be by "Appeal App.," followed by the page numbers. References to Petitioners' Petition for Rehearing *En Banc* in Appeal No. 97-1135 will be by "Reh'g Pet.," followed by the page numbers.

but as the First Circuit observed, their claims "coalesce[d] around one general complaint" that Volvo and its co-defendants, Trebol Motors Distributor Corporation ("Distributor"), Trebol Motors Corporation (together with Distributor, "Trebol"), Jorge Gonzalez, Conchita Navarro de Gonzalez and Ricardo Gonzalez Navarro (collectively, the "Gonzalezes"), "conspired to violate, and did in fact violate, RICO by engaging in hundreds of predicate acts of mail and wire fraud." Pet.App. 31. The victims of the alleged conspiracy were Petitioners, a class of individuals and corporations that had purchased Volvo 200 Series automobiles in Puerto Rico between 1983 and 1993.

Petitioners tried their claims in two phases — liability first, then damages — in the summer of 1996. At trial, Petitioners argued that Volvo had participated in "five frauds," all of which allegedly damaged the plaintiff class. Petitioners argued that the proof of these five frauds established violations of RICO §§ 1962(a), (c) and (d), based upon "predicate acts" of mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343. As the First Circuit later observed, Petitioners did not claim that the five frauds were "isolated acts of fraud. . . ." Rather, the five frauds consisted of "different groups of activity, each comprising multiple acts; if the activities within the group were fraudulent, any one group would reflect multiple 'predicate acts' under RICO." Pet.App. 34.

On July 25, 1996, the jury returned a verdict on liability. The jury found that Volvo was liable for violating RICO § 1962(c) and conspiring to violate RICO under § 1962(d). On August 1, 1996, the jury found Volvo liable for $43,197,100 in damages, which the district court then trebled under 18 U.S.C. § 1964(c) to yield an award of $129,591,300 to Petitioners. The district court entered final judgment against Volvo and its co-defendants in that amount on October 10, 1996. Pet.App. 32. Volvo timely appealed the October 1996 judgment to the First Circuit.

Volvo's Appeal and Petitioners' Conspiracy Claims

While the parties disagreed on numerous issues during trial and on appeal, at no time before Petitioners filed their petition for rehearing in the First Circuit did either party contest the standard for proving liability under RICO's conspiracy provision, § 1962(d). Neither side objected to the district court's jury instructions on RICO conspiracy.[2] On appeal, both sides agreed that Volvo could not be held liable under § 1962(d) unless Petitioners proved at least two things: (1) that Volvo knowingly joined a conspiracy to violate RICO; and (2) that Volvo agreed to commit two predicate acts as part of the conspiracy. *See* Volvo Br. 29; Ptrs.Br. 44-45.

This Court's decision in *Salinas* affected only the second of those two issues: whether Volvo had to have agreed to commit two RICO predicate acts in order to be found liable under § 1962(d). As for the first issue — whether Volvo knowingly joined a conspiracy to violate RICO, regardless of which conspirator agreed to commit RICO predicate acts — *Salinas* left the fundamental law of conspiracy unchanged: in order to impose conspiracy liability on a defendant, there must be proof that the defendant knowingly agreed to participate in the conspiracy. It was the application of that bedrock principle, not the pre-*Salinas* First Circuit precedent concerning who would commit predicate acts, that caused the First Circuit to reverse the judgment against Volvo on the conspiracy charge.

---

[2] The district court instructed the jury: "[P]laintiffs allege that Volvo conspired with Trebol Motors Distributor Corporation, Trebol Motors Corporation, Ricardo Gonzalez Navarro and Conchita Navarro de Gonzalez, to violate RICO. Plaintiffs must prove that Volvo knowingly became a member of the conspiracy alleged in the complaint. This means that plaintiffs must prove that Volvo joined with other members of the conspiracy in an agreement to violate RICO, as explained in plaintiffs first two claims [under §§ 1962(a) and (c)]." Jt.App. 2515.

In a case such as this, where the alleged conspiracy was to be accomplished by predicate acts of mail or wire fraud — one element of which is knowing and willful intent to defraud — proof of that knowledge and intent was a required element for both the substantive RICO offense and the conspiracy RICO offense. The First Circuit's opinion in this case makes it emphatically clear that there was no proof of any such knowledge and intent on the part of Volvo. "To prove mail or wire fraud, plaintiffs must show three elements: a 'scheme to defraud,' Volvo's 'knowing and willful participation in the scheme with the intent to defraud,' and the use of the mails or interstate wire or radio communication in furtherance of the scheme . . . . We conclude that none of the frauds has been established against Volvo, that the judgment against it must be reversed, and that plaintiffs' claims against Volvo fail in their entirety." (*quoting United States* v. *Cassiere*, 4 F.3d 1006, 1011 (1st Cir. 1993)). Pet.App. 34-35. Thus, the First Circuit had no occasion to reach the second issue — *i.e.*, which of the alleged conspirators agreed to commit predicate acts — the only issue that *Salinas* could possibly have affected.

The Demise of the "Five Frauds"

The First Circuit's disposition of the "five frauds" alleged by Petitioners — which Petitioners have now reduced to "three frauds" — was based on the absence of any evidence of Volvo's knowing participation in any "conspiracy" or "scheme" to defraud.[3] The court reasoned as follows.

---

[3] With respect to two of the "five frauds" — one involving the addition of emblems and accessories to Volvo automobiles once they arrived in Puerto Rico, and another based solely on evidence that Volvo automobiles in Puerto Rico were more expensive than similar models in the mainland United States — the First Circuit did not reach the question of Volvo's participation in the alleged "frauds," as the court held that neither activity constituted fraud. *See* Pet.App. 38-46. Petitioners do not challenge the First Circuit's disposition of those two "frauds." *See* Petition at 6 & n.2.

Double Invoicing. During the class period, Trebol imported Volvo Series 200 vehicles from Volvo for retail sale in Puerto Rico. From 1986 to 1993, a Liechtenstein corporation named Auto Und Motoren ("AUM") served as the guarantor of Trebol's obligation to pay for the automobiles that it purchased from Volvo. In order to keep AUM informed of its potential liability under its guarantee, Volvo would send to AUM a copy of the invoice that accompanied each shipment of vehicles to Trebol. Petitioners presented evidence that during 1986-89, "AUM sent Trebol additional invoices for the same vehicles but with different purported prices," ranging from $50 to $3,000 in excess of the Volvo invoice price. Trebol used the invoices it received from AUM "to obtain higher inventory financing from Puerto Rican banks" and to calculate its retail prices. Trebol would pay the higher invoice amount to AUM, which then paid Volvo the original invoice amount. There was no evidence that Volvo received payment of anything more than what it had invoiced to Trebol. As the First Circuit ruled: "Self-interest gave *Trebol* reason to participate in such a fraud, but there was little reason for *Volvo* to do so absent proof — *and proof was absent* — that Volvo got more than its original invoice price" (emphasis added). Pet.App. 46, 48; *see also* Jt.App. 394-95, 529-33, 590-97, 608-13, 2138-39.[4]

Although there was evidence that the AUM scheme was fraudulent conduct *by Trebol*, there was no evidence that *Volvo* knew of or participated in the AUM fraud. On that issue the First Circuit's holding was very precise: "After reviewing the evidence presented, we do not believe that *any rational jury could conclude* that it was more likely than not

[4] The First Circuit's reference to the absence of proof that Volvo received anything more than its invoice price bore only on the lack of evidence that Volvo participated in any RICO violation or conspiracy. It should not be confused with a statement that Volvo may have participated in a RICO conspiracy (a conclusion that the First Circuit repeatedly held could not be supported by the evidence), but that proof was absent that Volvo committed or agreed to commit two or more predicate acts.

that Volvo knowingly participated in the AUM fraud." Pet.App. 47 (emphasis added). Later the court reiterated the same point: "In all events, on the evidence of record, *it would be pure speculation* for a jury to conclude that Volvo had *any knowledge* of the double invoice scheme." *Id.* at 48 (emphasis added).

Disclosure Labels. Contrary to specific findings of the First Circuit, Petitioners claim that Volvo was part of a scheme "to create false and misleading disclosure labels to trick Petitioners into paying excessive prices for their cars." Petition at 8. That claim relates to automobile-labeling requirements imposed by Puerto Rico law and by federal law. Title 23, L.P.R.A. § 1023 (a Puerto Rico statute popularly known as "Law 77") required the "dealer" or "seller" of an automobile to affix a label to it disclosing the vehicle's "factory cost." The federal Monroney Act, 15 U.S.C. § 1231 *et seq.*, required the manufacturer's suggested retail price ("MSRP") to appear on a separate label affixed to the vehicle by its "manufacturer," a statutory term that includes the vehicle's importer when the vehicle is manufactured abroad and imported into the United States or Puerto Rico. *See id.* at § 1231(a). Petitioners claimed at trial and on appeal that Volvo schemed with its co-defendants to provide inflated amounts for "cost including shipping and insurance" and "suggested sales price" on labels affixed to cars sold to Petitioners, thereby duping Petitioners into paying inflated retail prices. *See* Petition at 8.

That claim by Petitioners was entirely unsupported by evidence. As the First Circuit found, "there is *no evidence* that *Volvo ever knew* that AUM was furnishing false figures to Trebol, which Trebol then used in the Law 77 labels." Pet.App. 50 (emphasis added).

With respect to the claim of disclosure-label fraud, the court found, first, that "[t]here is no evidence, nor is there a basis to infer, that Volvo had any role in the preparation

or display of the labels." Pet.App. 50.[5] It was undisputed that Trebol prepared all of the labels affixed to Volvo automobiles sold in Puerto Rico. *See* Jt.App. 464-65, 2051, 2137. Nor was there any basis to infer that Volvo had knowledge that labels prepared and displayed by Trebol contained false information. In response to Petitioners' claim that Volvo representatives could have observed false label information concerning factory cost, the court assumed "*arguendo* (and seemingly without direct evidence) that Volvo representatives saw the Law 77 labels [and] that they read Spanish . . . ." Pet.App. 50-51. Even making that assumption, the court pointed out that there was no indication on the labels whether the reported cost was factory cost, or whether it included accessories shipped separately from Sweden, or whether it included a potentially significant importer markup. As the court concluded, "To infer from this that *Volvo knew* that Trebol was using false Law 77 labels is a *leap that cannot rationally be made.*" *Id.* at 51 (emphasis added).

The First Circuit also dismissed Petitioners' related contention that, as a "manufacturer" of Volvo automobiles, Volvo had a duty under the Monroney Act to affix its own disclosure labels, showing the MSRP, to vehicles it shipped to Puerto Rico. The court noted that there was some force to Volvo's argument that the Monroney Act duty fell on Trebol as the importer, not on Volvo. The court held, however, that there was no need to resolve that issue. "Even if the Monroney Act did apply to Volvo, plaintiffs' fraud claim on this theory would fail for lack of proof of scienter . . . plaintiffs offered no evidence that Volvo knew it had a duty to affix labels to cars sold by Trebol . . . . Under these circumstances, *an inference of deliberate deception by Volvo would be impossible to sustain* even if we agreed that Volvo had such a legal duty under the Monroney Act — a point on which

[5] Again, the Court's statement underscored the fact that Volvo did not knowingly participate in any RICO violation or conspiracy.

we are at the very least doubtful." Pet.App. 53 (emphasis added).

FOB Price Reporting To Excise Tax Authority. In the district court, Petitioners accused Volvo of participating in a scheme to defraud the Puerto Rican government of excise taxes on vehicles imported into Puerto Rico. Petitioners called this an "excise tax fraud" scheme in the district court; they rechristen the scheme as "FOB price fraud" in their Petition.

Petitioners make three arguments in support of this claim. First, they argue that "*Respondents* were required by law to certify to the Puerto Rican government a variety of information regarding every car imported, including the 'factory gate' ('FOB') price. The government, in turn, used the FOB price to set the excise tax for the vehicle. *Respondents*, however, provided false FOB prices . . . in order to minimize their tax exposure . . . ." Petition at 8 (emphasis added). Petitioners' assertions are false: as the First Circuit held, it was *Trebol* that submitted FOB price information to the Puerto Rican government, not Volvo. Indeed, the court held that "*no evidence* implicates Volvo in false reporting of the FOB price to the Puerto Rican Bureau of Excise Taxes." Pet.App. 37 (emphasis added); *see also* Jt.App. 1543-46 (Volvo was not required to pay excise taxes).

Second, Petitioners argue that Volvo knowingly assisted in Trebol's effort to circumvent excise taxes by furnishing Trebol with blank "certificates of origin" for vehicles shipped to Puerto Rico. Petition at 8; Appeal App. 1601. Once again, the underlying premise of the argument is false. The certificates of origin disclosed nothing about FOB prices. *See* Appeal App. 1601. Indeed, on appeal, Petitioners argued that the certificates were used solely to facilitate the provision of information about vehicle *horsepower* and *weight* values to the Puerto Rican tax authorities, values that Petitioners alleged Trebol deliberately understated in order to reduce its

excise tax liability. *See* Ptrs.Br. 12 n.12, 36 n.29. Contrary to those claims, the First Circuit ruled that Volvo's and Trebol's horsepower and weight disclosures were accurate, in compliance with Puerto Rico's tax laws, and did not constitute tax fraud. *See* Pet.App. 35-36, *see also* Jt.App. 320-21, 330, 332-33, 336-43.

Third, Petitioners argue that the jury could have inferred Volvo's knowing participation in Trebol's alleged FOB price-fraud scheme from evidence of Volvo's agreement to list an increase in factory invoice prices as a separate line item on invoices sent to Trebol. Petitioners claim that the separate listing allowed Trebol to evade taxes. *See* Petition at 8. The First Circuit disposed of this contention succinctly: "[T]he surcharge was clearly indicated on Volvo's invoices and would have been evident to the tax authorities if disclosed. Trebol did not submit the invoices to the authorities, and it is unclear whether it had a duty to do so. But it is clear that the price Trebol submitted for tax purposes was not controlled by Volvo's itemization of price elements on the invoices." Pet.App. 37 n.6. The First Circuit again concluded that Petitioners had failed to prove Volvo's knowing participation in any fraudulent scheme.

The First Circuit also ruled that, if there had been evidence — which there was not — of Volvo's knowing participation in a scheme to understate FOB prices, there could be no resulting RICO liability (substantive or conspiracy) against Volvo, because Petitioners themselves would not have been injured "by reason of" that scheme, as required by 18 U.S.C. § 1964(c). Pet.App. 38.

Salinas and the Petition for Rehearing

This Court decided *Salinas* on December 2, 1997, the same day that the First Circuit held oral argument on Volvo's appeal. In the eight months that separated the oral argument

from the First Circuit's decision on the appeal, Petitioners chose not to exercise their right under Rule 28(j), Fed.R.App.P., to bring *Salinas* to the attention of the First Circuit.[6]

The First Circuit ruled on Volvo's appeal on July 28, 1998. Although Petitioners note that *Salinas* was decided "well after the briefing in [this] case was completed" and tell this Court that "the parties did not otherwise bring *Salinas*' holding to the attention of the court of appeals," Petition at 21, the truth is that on August 13, 1998, Petitioners submitted a petition for rehearing that expressly brought *Salinas* to that court's attention. In that rehearing petition, counsel for Petitioners certified to the First Circuit "that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States . . . : *Salinas* v. *United States* . . . ." Counsel further certified that "this appeal involves one or more questions of exceptional importance," including "whether a defendant may be found liable under RICO conspiracy even if exculpated under 18 U.S.C. § 1962(c) . . . ." Petitioners then squarely told the First Circuit that the panel's opinion "fails to consider the Supreme Court's recent ruling in *Salinas* v. *United States* . . . which held that a defendant can be convicted for RICO conspiracy, even if he is not convicted of a substantive RICO violation." Reh'g Pet. v, 2.

Nearly two months later, on October 7, 1998, the First Cir cuit, "having . . . carefully considered" Petitioners' petition for rehearing and suggestion for rehearing *en banc*, voted to deny rehearing. Pet.App. 76-77.

---

[6] Rule 28(j) provides in part: "If pertinent and significant authorities come to a party's attention after the party's brief has been filed — *or after oral argument but before decision* — a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations." (Emphasis added).

REASONS FOR DENYING THE WRIT

I. The First Circuit's Decision Not To Reconsider Its Ruling In Light Of *Salinas* Was Correct, Because *Salinas* Has No Bearing On This Case.

Petitioners' sole argument for a GVR order — that the First Circuit premised its decision on a rule that this Court rejected in *Salinas* — rests on sheer invention. Petitioners contend that the First Circuit required proof that Volvo itself agreed to commit two or more predicate acts, and that, based on its finding that there was no such proof, the First Circuit reversed the judgment on RICO conspiracy as to Volvo. Tellingly, although Petitioners quote snippets from the First Circuit's opinion, they make no effort to support their assertion that the First Circuit ruled for Volvo "[b]ased on its finding that Volvo had not itself committed or agreed to commit two or more predicate acts." Petition at 18. They do not support that assertion by quoting from, or citing to, the First Circuit's decision, because there is nothing in that decision that confirms Petitioners' inventive picture of what the First Circuit held. The First Circuit's judgment does not rest on anything even arguably affected by *Salinas*. Rather, the judgment rests solely on the First Circuit's determination that Petitioners failed to prove that Volvo knowingly participated in any fraudulent scheme or other RICO conspiracy.[7] *See infra* at 14-16. For that very reason, the First Circuit never

[7] The artificiality of Petitioners' argument is underscored by the fact that, if there had been sufficient evidence of knowledge and conspiratorial intent on the part of Volvo, there would have been no doubt that Volvo itself would have committed multiple RICO predicate acts of mail and wire fraud. Every invoice and every wire communication from Sweden to Puerto Rico, for example, would have been a predicate act by Volvo. Petitioners themselves argue that there were "hundreds of predicate acts of mail and wire fraud." Petition at 5. It is inconceivable that the First Circuit would have reversed on the ground that there was no evidence of multiple predicate acts by Volvo, if it could have found that Volvo participated knowingly in a RICO conspiracy.

reached the issue raised in *Salinas:* it found that the threshold element required for RICO conspiracy liability — knowing participation in a RICO scheme — was absent. Accordingly, since the First Circuit held that Volvo had not been involved in *any* conspiracy, the First Circuit had no occasion to consider which alleged conspirator had agreed to commit the RICO predicate acts.

A. Salinas *Did Not Address Any Issue Relevant To The First Circuit's Decision.*

Even the most cursory examination of *Salinas* confirms that the *Salinas* decision has no bearing whatever on the First Circuit's decision in this case. Defendant Salinas was the subject of a federal prosecution stemming from a bribery scheme operated by a Texas county sheriff. Salinas was one of the sheriff's principal deputies. The scheme consisted of permitting certain women to make "contact visits" with a federal prisoner who was housed in the Texas county jail pursuant to an agreement with the federal government. The prisoner paid the sheriff a fixed amount ($6,000) per month and $1,000 for each contact visit, which occurred twice a week. When the sheriff was unavailable, Salinas would arrange for the contact visits and occasionally would stand watch outside the room where the visits took place. Salinas received a pair of watches and a pickup truck in return for his assistance with the scheme. *Salinas*, 118 S.Ct. at 472.

Salinas was prosecuted under RICO §§ 1962(c) and (d). A federal jury acquitted Salinas on the substantive RICO count, but convicted him on the RICO conspiracy count. On appeal, Salinas argued that the jury could not find him liable for RICO conspiracy unless the government proved that he agreed to commit two predicate acts himself. *Id.* at 477-78. This Court held that RICO § 1962(d) imposes no such requirement. Rather, the Court held that a defendant could be found liable under § 1962(d) so long as he or she knew about the criminal scheme and willfully agreed to further or

facilitate it. Because the Court found that Salinas "knew about and agreed to facilitate" the bribery scheme, there was no need to show that he had committed two predicate acts. *Id.* at 478.

Although *Salinas* resolved a disagreement among the circuits about whether RICO § 1962(d) required every conspirator to agree to commit at least two predicate acts, *see Salinas*, 118 S.Ct. at 476, *Salinas* did not eliminate the basic elements required for a finding of conspiracy liability under § 1962(d). One of those elements — an element without which the case comes to an end — is that the defendant's agreement to enter into a RICO conspiracy has to be knowing and intentional.[8] Indeed, this Court held that Salinas could be found liable under § 1962(d) precisely *because* he knew about and intentionally agreed to facilitate the Texas bribery scheme. It is inconceivable that this Court would have found Salinas liable under § 1962(d) — or would have even reached the question presented in *Salinas* — had the jury first found that Salinas lacked the knowledge and intent required for a finding of conspiratorial liability.

B. *The First Circuit's Decision Foreclosed Any Argument That* Salinas *Could Be Relevant To The Result.*

In their zeal to find some similarity between the First Circuit's decision and *Salinas*, Petitioners conveniently ignore the First Circuit's holding that the evidence at trial simply could not support a finding that Volvo knowingly participated, or agreed to participate, in any RICO scheme.

[8] Otherwise, RICO § 1962(d) would permit a finding of liability merely by proof that a defendant was associated with a RICO enterprise. The courts that have considered that argument have rejected it. *See, e.g., Goren* v. *New Vision Int'l, Inc.*, 156 F.3d 721, 732 (7th Cir. 1998); *Fitzgerald* v. *Chrysler Corp.*, 116 F.3d 225, 227 (7th Cir. 1997) (declining to apply RICO to "a free-standing corporation . . . merely because [the corporation] does business through agents, as virtually every manufacturer does").

Petitioners fail to explain why, having held that the threshold element essential to a finding of Volvo's liability under RICO § 1962(d) was missing, the First Circuit would have gone on to consider the question presented in *Salinas*. Instead, Petitioners advance the false notion that the First Circuit reversed as to Volvo on the conspiracy count after (supposedly) finding that Volvo did not agree to commit two or more predicate acts. There is no support whatever for that claim.

As to the alleged "excise tax fraud," the First Circuit found that Volvo's certification to Trebol of car horsepower and weight complied with the regulations and properly disclosed how the calculations were made. *See* Pet.App. 35-36. With respect to Trebol's certification of FOB prices to the Puerto Rico tax authorities, the Court found that, to the extent there was any false underreporting by Trebol of the FOB price, "*no evidence implicates Volvo* . . . ." *Id.* at 37 (emphasis added). The First Circuit also rejected Petitioners' contention that Volvo facilitated any fraudulent scheme regarding the reporting of FOB prices by listing a surcharge as a separate line item on its invoices sent to Trebol. *Id.* at 37 n.6. Finally, the First Circuit concluded that, even if Petitioners' evidence had been sufficient — which it was not — to establish Volvo's knowing participation in the alleged scheme, there could be no liability under § 1962(d) because Petitioners had failed to prove that they were injured "by reason of" that alleged scheme. *Id.* at 38; *see also* 18 U.S.C. § 1964(c); *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496-97 (1985).

As to the alleged "double invoice" fraud, the First Circuit held that "[no] rational jury could conclude that . . . Volvo knowingly participated in the AUM fraud."[9] Pet.App. 47.

[9] Petitioners misleadingly contend that the First Circuit did not reject the notion that Volvo "facilitated" the double invoice scheme, "which would be a sufficient basis" for RICO liability. Petition at 22. The First Circuit expressly found that Volvo had no knowledge of the AUM scheme. *See*

The First Circuit further ruled that "it would be pure speculation for a jury to conclude that Volvo had any knowledge of the double invoice scheme."[10] *Id.* at 48. Finally, as to the alleged "disclosure label" fraud, the First Circuit held that there was "no evidence, nor ... a basis to infer, that Volvo had any role in the preparation or display of the labels." *Id.* at 50. The First Circuit also noted that there was no evidence "that Volvo ever knew that AUM was furnishing false figures to Trebol, which Trebol then used in the Law 77 labels." *Id.*

Thus, the First Circuit reversed the judgment against Volvo on both RICO § 1962(c) and § 1962(d) because, as far as the evidence showed, Volvo had no knowledge of and never participated in or agreed to participate in any fraudulent activity. There is no suggestion in the First Circuit's opinion that the court applied its pre-*Salinas* RICO conspiracy precedent,[11] and Petitioners offer no theory of how doing so could have been relevant to anything before the First Circuit.

Pet.App. 46-48. As *Salinas* made clear, a defendant cannot be held liable for conspiracy under RICO § 1962(d) unless he or she knowingly and willfully agrees to further or facilitate the scheme. *See Salinas*, 118 S.Ct. at 477. The First Circuit found no such proof.

[10] Petitioners recognize these holdings, *see* Petition at 17 (double invoices), 18 (disclosure labels), but quarrel with the First Circuit's assessment of the evidence. Such fact-specific disagreements obviously do not provide a basis for granting certiorari or vacating the judgment below. *See Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (GVR order appropriate only when "it appears that ... a re-determination may determine the ultimate outcome of the litigation").

[11] Indeed, the First Circuit did not refer at all to *United States* v. *Winter*, 663 F.2d 1120 (1st Cir. 1981), the case that set forth the First Circuit's view of the test for RICO conspiracy that was rejected in *Salinas*. The First Circuit did not need to rely on *Winter* or its progeny because it found no evidence of Volvo's knowing participation in any fraudulent activity. Petitioners' extraordinary suggestion that, because members of the panel below had applied *Winter* in other cases, they implicitly applied *Winter* to this case, to which it was not applicable (*see* Petition at 13-14 n.5), is plain irrationality.

II. GVR Is Inappropriate In Any Event Because Petitioners Squarely Presented *Salinas* To The First Circuit In Their Petition For Rehearing Below.

Petitioners contend that the First Circuit's supposed failure to consider *Salinas* is "understandable," given that "the parties did not . . . bring *Salinas*' holding to the attention of the court of appeals." Petition at 21. As we have shown, this is utterly false. Petitioners expressly brought *Salinas* to the First Circuit's attention in their Petition for Rehearing *En Banc*, filed August 13, 1998.[12] In that petition, Petitioners asked the First Circuit to reconsider its decision in light of its "fail[ure] to consider the Supreme Court's recent ruling in *Salinas* v. *United States* . . . ." Reh'g Pet. 2. Petitioners called attention to *Salinas* in yet another way. The First Circuit's Local Rules require that counsel suggesting *en banc* consideration file a certification as part of its submission, stating that the panel's opinion is contrary to the decisions of this Court or of the First Circuit, with specific citations to the case or cases that support reconsideration. *See* First Cir. Loc.R. 35.1. The very *first* case cited in Petitioners' certification was *Salinas*. *See* Reh'g Pet. v. There can thus be no question that, given Petitioners' concerted effort to inform the First Circuit of *Salinas*, the court below was fully apprised both of this Court's *Salinas* ruling and of Petitioners' argument that *Salinas* calls for a different result in this case.

In the end, despite Petitioners' efforts to obtain reconsideration in light of *Salinas*, the First Circuit denied the request. As Petitioners acknowledge, the First Circuit "carefully considered" the petition for nearly two months before denying rehearing. Petition at 2, 4; Pet.App. 76-77.

[12] The First Circuit treats a petition for rehearing *en banc* as a petition for rehearing by the original panel as well. *See* First Circuit Internal Operating Procedures X(C).

For the reasons set forth in Part I, *supra*, the First Circuit was correct to deny rehearing.

III. There Is No Reasonable Probability That The First Circuit Would Alter Its Ruling If It Were Ordered To Reconsider Its Decision In Light Of *Salinas*.

Given the facts of this case, there is no chance whatsoever — much less a "reasonable probability" — that the First Circuit's decision "rests upon a premise that it would reject" if it were to reconsider its ruling — for a second time — in light of *Salinas*. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). As we have shown, the First Circuit's decision turned on a ruling that Petitioners had offered no evidence that Volvo knowingly or willfully participated in any RICO scheme. Accordingly, there was no need — and there would have been no excuse — to reach the issues presented in *Salinas*. Thus, there is absolutely no basis for asserting that *Salinas* "cast[s] substantial doubt on the correctness" of the First Circuit's decision. *Lawrence*, 516 U.S. at 170.

Petitioners nonetheless suggest that, if there were a remand, the First Circuit would at least apply "a substantially different standard of proof," based on the settled First Circuit precedent of *Aetna Cas. Sur. Co.* v. *P & B Autobody*, 43 F.3d 1546 (1st Cir. 1994), to the non-*Salinas* question of whether there was sufficient evidence that Volvo knowingly participated in a RICO conspiracy. Petition at 22.

Even if such a result were likely, it would hardly support a grant of certiorari, much less a GVR order: this Court does not sit to make sure that the circuit courts properly apply the law of their respective circuits. But in fact Petitioners' suggestion about a different standard of proof is simply another exercise in fiction, for the First Circuit in this case has already followed the *Aetna* standard assiduously, searching the record, including all circumstantial evidence,

for some proof that Volvo knew of, or knowingly joined in, any RICO conspiracy.[13] The court made that search and could find no such proof. To suggest that the First Circuit, if asked to look again with *Salinas* in mind, might apply *Aetna* differently, and might suddenly discover proof of Volvo's conspiratorial guilt, is sheer fantasy — particularly since *Salinas* has no bearing on how *Aetna* is applied, and since the way Petitioners imagine *Aetna* might be applied, were they to win a remand, is precisely the way *Aetna* has been applied already.

[13] The First Circuit cited *Aetna* in its decision in this case. Pet. App. 51 n.19. It should be noted, also, that Petitioners made the very same *Aetna*-based argument in their unsuccesful petition for a rehearing. *See* Reh'g. Pet. 1.

CONCLUSION

To justify a GVR order in this case, one would have to say that, even when an intervening decision that could not logically alter the result is called to the attention of a lower court in a petition for rehearing, which that court proceeds to deny, this Court's time and resources should be made available to permit Petitioners to ask the lower court yet again to consider that irrelevant intervening decision, perhaps on the off chance that the court below would have a change of heart for reasons unrelated to the merits of that decision. Needless to say, that plea represents an abuse of the GVR process. The petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

LAURENCE H. TRIBE
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

GAEL MAHONY
(Counsel of Record)
HILL & BARLOW, A PROFESSIONAL CORPORATION
One International Place
Boston, MA 02110
(617) 428-3000

RAFAEL PEREZ-BACHS
NEREIDA MELENDEZ-RIVERA
MCCONNELL VALDES
270 Munoz Rivera Avenue
Hato Rey, PR 00918
(787) 759-9292

MICHAEL D. VHAY
ANDRES W. LOPEZ
HILL & BARLOW, A PROFESSIONAL CORPORATION
One International Place
Boston, MA 02110
(617) 428-3000